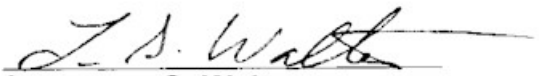
Dated: December 27, 2006



Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: NANCY J. SUTTON, *Debtor*	Case No. 05-32524 Adv. No. 05-3447
Ruth A. Slone, Trustee, *Plaintiff* v. FirstDay Financial Credit Union, *Defendant*	Judge L. S. Walter Chapter 7 **DECISION GRANTING SUMMARY JUDGMENT TO TRUSTEE**

This adversary proceeding seeking preference avoidance pursuant to 11 U.S.C. § 547(b) was set for trial on August 16, 2006, but just prior to the commencement of trial the parties reached agreement on all factual and legal issues with one exception. That exception was the applicability of the "earmarking doctrine," the only defense to preference avoidance interposed by the Defendant. As a consequence, the trial was not held and the court entered an *Order Setting Briefing Schedule* (doc. 29) on August 16, 2006. A *Stipulation of Facts* (doc. 31) was

filed on September 6, 2006. Also, now before the court are *Plaintiff's Final Trial Memoranda* (doc. 22) filed by the Trustee on July 5, 2006, *Memorandum of FirstDay Financial Credit Union* (doc. 32) filed by the Defendant on September 32, 2006, and *Plaintiff's Reply to Memorandum of FirstDay Financial Federal Credit Union* (doc. 33) filed by the Trustee on September 13, 2006.

In effect, Defendant has admitted all of the factual elements necessary for preference avoidance and recovery by the Trustee. While the parties have not specifically mentioned summary judgment or Fed. R. Bankr. P. 7056, it is clear that determination of a single legal issue will result in final judgment in favor of one of the parties. Therefore, the court will proceed in accordance with Fed. R. Bankr. P. 7056, taking into consideration the aforementioned written submissions and the entire record in this case.

Fact Summary

Less than ninety days prior to filing her bankruptcy case, Debtor paid an unsecured debt owing to Defendant in the amount of $6,582.01. To make the payment, Debtor used a convenience check she had received in the mail from her credit card company, Providian Bank, thereby creating an unsecured debt to Providian Bank for the same amount. As further set forth in the *Stipulation of Facts*:

> Debtor had control of whom and/or what was to be paid by the Providian Bank convenience check. Providian Bank did not require that Debtor use the convenience check to pay any one creditor. Providian Bank did not provide the Debtor with the convenience check with specific instruction that she was only to use the convenience check to pay defendant.

(doc. 31).

Summary Judgment Standard

The appropriate standard to address the motion for summary judgment filed in this adversary proceeding is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy

adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(c) states in part that a court must grant summary judgment to the moving party if:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the burden is on the nonmoving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party's claim; or 2) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Id.* at 331-32. Thereafter, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

Legal Analysis

It is unnecessary to repeat here a full explication of the "earmarking doctrine" and its application to these simple facts. Numerous courts, including the Sixth Circuit Court of Appeals and lower courts in this circuit, have addressed the legal issues involved on very similar facts. *See, e.g., In re Montgomery*, 983 F.2d 1389 (6th Cir. 1993); *In re Anderson*, 275 B.R. 264 (Bankr. W.D. Ky. 2002). Some have even dealt precisely with convenience checks used to pay other credit card accounts. *See In re Spitler*, 213 B.R. 995, 997 (Bankr. N.D. Ohio 1997) (noting that the convenience check scenario is factually similar to the facts of the *Montgomery* case). In

short, Defendant does not make a single argument that has not been thoroughly addressed and rejected by the *Montgomery* case and then further amplified by subsequent case law in this Circuit.

Essentially, Defendant's argument is that the convenience check used by Debtor simply transferred an unsecured debt from Defendant to Providian Bank and consequently did not diminish the estate. Defendant's argument is both a mischaracterization of the law and faulty logic. The general rule is that "transfers by a debtor of borrowed funds constitute transfers of the debtor's property because the borrowed funds, had they not been transferred, would have been available in bankruptcy to satisfy the claims of other creditors." *Adams v. Anderson (In re Superior Stamp & Coin Co, Inc.),* 223 F.3d 1004, 1007 (9th Cir. 2000); *Montgomery*, 983 F.2d at 1395; *Matter of Smith*, 966 F.2d 1527, 1533 (7th Cir. 1992); *Spitler*, 213 B.R. at 997. It is well established that such transfers do diminish the estate. *Montgomery*, 983 F.2d at 1395; *Smith*, 966 F.2d at 1537 ("When a debtor effectively borrows nonearmarked funds and exercises control by using the funds to pay a preferred creditor over others, the estate has been diminished.").

The "earmarking doctrine" is an exception to the general rule. *Montgomery*, 983 F.2d at 1395. The "determinative issue" in deciding whether the earmarking exception applies is "whether the debtor exercised dominion and control over the loan proceeds." *Spitler*, 213 B.R. at 998. If the debtor decides to whom to pay the funds, and not the new lender such as Providian Bank in our case, then the exception does not apply because the debtor controls the proceeds. *Montgomery*, 983 F.2d at 1395 ("[W]here the borrowed funds have been specifically earmarked *by the lender* for payment to a designated creditor, there is held to be no transfer of property of the debtor") (emphasis added); *Spitler*, 213 B.R. at 998 ("for the earmarking doctrine to apply it must be the new creditor, not the debtor, who stipulates as a condition of the loan that the proceeds be used to pay the pre-existing loan").

As is obvious from the stipulated facts recited above, the new lender, Providian Bank, exerted no control whatsoever in this transaction and the Debtor was in full control. These simple uncontroverted facts made Defendant's earmarking argument completely untenable from its inception. The clear precedent on these issues in this circuit, and the lack of any nonfrivolous argument for the extension, modification, or reversal of that existing law, leads this court to conclude that the Defendant's continued prosecution of its "earmarking" defense in this case is unwarranted and a waste of judicial resources. Should this Defendant or its counsel engage in such conduct again in any other case, the court shall take this case into consideration in imposing appropriate sanctions.

Conclusion

For the foregoing reasons, it is hereby **ORDERED** as follows:

1. The Motion for Summary Judgment of Ruth A. Slone, Trustee, is **GRANTED** and judgment is rendered against FirstDay Financial Credit Union in the amount of $6,582.01 plus interest from the date of first demand plus costs.
2. The Motion for Summary Judgment of FirstDay Financial Credit Union is **DENIED**.

SO ORDERED.

cc:
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